Filed 10/1/03 P. v. Rodriguez CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. CLAUDIA RODRIGUEZ, Defendant and Appellant.	C041788 (Super. Ct. No. CM013210)

A lovers' triangle ended tragically when defendant Claudia Rodriguez and her former lover, Guillermo Gallegos, suffocated his current girlfriend in defendant's van and later dumped her body along the Sacramento River. An information charged defendant with murder. (Pen. Code, § 187, subd. (a).)[1] A jury found defendant guilty of second degree murder. Sentenced to 15 years to life, defendant appeals, contending: (1) the court erred in denying her motion to exclude a statement to police as involuntary; (2) instructional error; (3) the court erred in

[1] All further statutory references are to the Penal Code unless otherwise indicated.

refusing defendant's request for a continuance; and (4) the court improperly refused defendant's request to admit polygraph evidence. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged defendant with the murder of Biviana Aguirra. (§ 187, subd. (a).) Defendant entered a plea of not guilty.

Defendant sought to substitute counsel and requested a 30-day continuance of the trial date just prior to the start of trial. The trial court denied the request for a continuance but allowed substitution of counsel prior to trial. Defendant proceeded to trial with existing counsel.

A jury trial followed. Evidence and testimony presented at trial revealed the following sequence of events.

Defendant is the former girlfriend of Guillermo Gallegos and the mother of his child. The victim, Aguirra, dated Gallegos after his involvement with defendant.

Late one evening in November 1999, defendant telephoned Aguirra at her home. Aguirra dressed and left the house, saying she was going out to meet defendant at some nearby apartments.

During their meeting, defendant gave Aguirra a stuffed rabbit that Aguirra had previously given to Gallegos. Aguirra returned home with the rabbit.

Aguirra changed clothes and left again. She told her mother she was going to give Gallegos "a surprise." Her family never saw her alive again.

Around 1:00 a.m. the next day, defendant arrived at Aguirra's home looking for her. After being told Aguirra was not there, defendant insisted that Aguirra's family check her bedroom. Gallegos arrived a short time later.

Later that morning, a fisherman found the body of a woman along the banks of the Sacramento River and contacted the sheriff's department. A white plastic grocery bag with a "Dollar Tree" logo covered the head. A second plastic bag with a "Winco" logo was stuffed in the victim's mouth. The victim's sweatshirt was pulled up around her shoulders; her pants were pulled below her waist. A shoe lay near the body. Tire marks on the nearby road showed a vehicle had turned around.

Fingerprint analysis confirmed the body was that of Aguirra. An autopsy revealed Aguirra died from asphyxiation and uncovered two areas of blunt trauma inflicted shortly before death.

Police learned Aguirra was last seen with defendant. A search of defendant's van unearthed several white plastic bags with Dollar Tree and Winco logos. A fingerprint matching that of defendant's thumb was lifted from the bag found over Aguirra's head.

Fiber analysis matched fibers found in Aguirra's clothes and hair with the blue carpet inside defendant's van. The bottom of the shoe found at the scene had a tire tread impression matching the van's tire. A jump rope, matching the description of one defendant had in her van, was also found at the scene.

Prior to the murder, defendant threatened Aguirra and sought to end Aguirra's relationship with Gallegos. Once, defendant arrived at Gallegos's residence when Aguirra was present and pounded on the bedroom door, shouting, "'I know you're in there and I'm going to kill you.'" Defendant called Aguirra a "bitch" and threatened to kill her.

Defendant also told a friend she had beaten up Aguirra. Defendant stated she knew someone who would be willing to stab Aguirra, but she did not "'want to take it that far.'" Several weeks before Aguirra's death, defendant called her home and told Aguirra's relatives she didn't know why Aguirra was dating Gallegos because defendant was the mother of his child and they were still together. Defendant tried to catch Aguirra cheating on Gallegos.

After Aguirra's death, a friend asked why defendant had killed Aguirra. Defendant told the friend she was sorry and knew it was wrong.

Officers interviewed defendant twice; both interviews were entered into evidence at trial. Two days after the murder, defendant spoke with police. Defendant told police she saw Aguirra for only 10 minutes the night of the murder. At that time, defendant returned the stuffed rabbit to Aguirra.

During a second interview later that day, defendant told officers she coaxed Aguirra into riding with her to meet Gallegos the night of the murder. Defendant, accompanied by Aguirra, picked up Gallegos. Gallegos ordered defendant to drive and told her when to stop. Gallegos went into the back

seat with Aguirra. He attempted to have sexual intercourse with Aguirra against her will.

Gallegos ordered defendant to get him a bag. Defendant found a bag in the back of the van and gave it to Gallegos. Defendant heard Aguirra screaming and saw Gallegos pull the bag over Aguirra's face. As Aguirra kicked and struggled, one of her shoes flew off. Gallegos told defendant to hold down Aguirra's arms. Defendant complied, holding the victim's arms tightly. Defendant held Aguirra's arms for about 30 seconds until she stopped struggling. Aguirra fell to the floor of the van.

Defendant turned the van around and drove to the bank of the Sacramento River. She opened the van door and helped Gallegos pull Aguirra's body from the van. The duo threw the body down the bank.

Gallegos told defendant to drive back to Aguirra's house. After defendant dropped Gallegos off down the block, she went to the house pretending to look for Aguirra. Later, defendant picked up Gallegos and drove him back to her house.[2]

Defendant offered only one witness. Her high school principal testified defendant had a reputation in the community for nonviolence.

During closing argument, the defense reminded the jury that Gallegos attempted to have sexual intercourse with Aguirra while

---

[2] Gallegos was charged with murder. The charges were dismissed.

defendant sat in the van. Defense counsel argued defendant acted impulsively and irrationally when she aided Gallegos.

The jury found defendant not guilty of first degree murder but guilty of second degree murder. Defendant filed a motion for a new trial; the court denied the motion.

The court sentenced defendant to 15 years to life. Defendant filed a timely notice of appeal.

DISCUSSION

I. STATEMENT TO POLICE

Defendant challenges the trial court's denial of her motion to exclude her statement to police. According to defendant, her statement was not made voluntarily but instead stemmed from an implied threat to take her infant son away unless she confessed.

Background

During trial, defendant moved to exclude her tape-recorded statement to police, arguing she made it involuntarily. The trial court held a hearing on the motion.

Kory Honea, a sheriff's detective, testified he contacted defendant outside the Jackpot Market after she got off work. He asked her to accompany him to the sheriff's substation. Honea told defendant she was not in custody and was free to leave. Defendant gave an interview at the substation and left.

After the initial interview, Honea interviewed Gallegos. Police then contacted defendant and asked her to return to the substation for further questioning. Defendant complied.

During the second interview, Honea told defendant he doubted her truthfulness at the initial interview. Defendant

began to admit her involvement in the murder. Honea advised defendant of her *Miranda* rights and the interview continued.[3]

During the interview and prior to the *Miranda* warning, defendant began crying and said: "I don't want to lose my son." Honea responded: "OK. You need to start worrying about yourself right now and the thing about it is every time you tell me a lie, you get closer and you get closer to losing your son and losing a whole bunch of your life."

Defendant told Honea that Aguirra's former boyfriend, Jose, suffocated Aguirra in defendant's van. After Honea expressed disbelief in the story, defendant asked to see her son. Honea replied: "OK. Who was really with you?" Defendant expressed fear of retaliation by Gallegos's brother. She told Honea: "He said if I say anything to make his brother go to jail, he's going to kill my family." Honea responded: "[I]f you talk to me honestly and tell me what happened . . . I will make sure that no harm comes to your family."

Defendant again asked to see her son. Honea responded by urging defendant to "tell me your side of the story. . . . Tell me what happened, OK?" Defendant again expressed fear of Gallegos's family. Honea responded: "[T]here are ways . . . that you can be protected . . . ."

Defendant asked: "If me and [Gallegos] go to jail, who gets my baby?" Honea responded: "Uh, the baby . . . let me ask

---

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

you a couple of questions, OK? Uh, you and [Gallegos] aren't married, right? . . . Is [Gallegos's] name on the baby's birth certificate? . . . Does [Gallegos] pay child support? . . . Does [Gallegos] have any custody paperwork? No? OK. [Y]ou guys have never been to court? . . . Then . . . your baby stays with your mom and da[d] most of the time . . . or a good portion of the time? OK. Then, I can say fairly confidently that the baby is gonna stay with your mom and dad, OK. I say that because in looking at the situation in here, I can't see, as it stands right now, [Gallegos] has any legal . . . papers to . . . and he goes to jail, then he's not have any . . . his family certainly wouldn't have a standing because there's no legal paperwork there. You guys weren't married or any of that . . . anything of that nature and the baby's been primarily . . . cared for by your mom and dad, right? So, people making those kind of decisions would look at all those factors. Does that make sense to you? OK? That's why I had to ask those questions, OK? I assume that's where you want your baby." Defendant responded in the affirmative, and Honea asked her to tell him what happened.

Defendant acknowledged she drove the van with Aguirra and Gallegos to the river and admitted helping hold Aguirra's arms while Gallegos put the bag over her head. Honea advised defendant of her *Miranda* rights.

At the hearing on the statements, defense counsel argued defendant's statements were made in response to Honea's threats and promises concerning her son. The trial court denied the

motion, finding: "It does not appear to the Court that the conduct of this interview was such that it rendered the product of the interview involuntary, so the Court will find that the statements generated by the interview were voluntary . . . ."

Discussion

Defendant focuses on her requests to see her son and her fear of losing custody of her son as indicative of the coerciveness of Honea's questioning. She claims Honea's statements "could have been understood as implied threats to take away her baby unless she confessed; and implied promises that, if she went to jail, the baby would remain with her family, and not with Gallegos' family."

At trial, the prosecution bears the burden of showing by a preponderance of the evidence that a confession was made voluntarily. (*People v. Williams* (1997) 16 Cal.4th 635, 659.) On appeal, we examine the facts to determine independently whether the trial court properly reached a conclusion of voluntariness. (*People v. Anderson* (1990) 52 Cal.3d 453, 470.)

Threats or promises relating to a defendant's relatives may render an admission involuntary. (*People v. Steger* (1976) 16 Cal.3d 539, 550.) The exploitation of a mother's fear that if she fails to cooperate with authorities she will not see her children for many years renders a confession involuntary. (*People v. Kelly* (1990) 51 Cal.3d 931, 953.) An officer's statement to a defendant that if he confessed his wife would be released in order to be together with their children for

Christmas rendered the confession involuntary. (*People v. Trout* (1960) 54 Cal.2d 576, 580, 585.)

Conversely, "if there is no express or implied promise made by the police, a defendant's mere belief that his or her cooperation will benefit a relative does not invalidate an admission." (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.) In addition, a confession will not be rendered involuntary when the officer makes neither a threat nor a promise, but only discloses an accurate statement of the circumstances. (*People v. Thompson* (1990) 50 Cal.3d 134, 170.) Nor is an admission or confession involuntary merely because an officer exhorts a defendant to tell the truth for his or her own good. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611.)

Our review of the interview transcript reveals Honea occasionally referred to defendant's son, but only in response to defendant's queries. When defendant stated she wanted to see her son, Honea did not respond to the request. Instead, Honea again urged defendant to tell the truth.

Defendant argues Honea's response to her statement that she did not want to lose her son constituted a threat. Honea responded that if defendant continued to lie she would "get closer to losing your son and losing a whole bunch of your life." Defendant argues Honea's comments echo those found coercive in *Lynumn v. Illinois* (1963) 372 U.S. 528 [9 L.Ed.2d 922] (*Lynumn*) and *U.S. v. Tingle* (9th Cir. 1981) 658 F.2d 1332 (*Tingle*).

In *Lynumn*, the officer questioning the defendant told her if she did not cooperate her government aid would be cut off and her children would be taken away. (*Lynumn*, *supra*, 372 U.S. at p. 533.) The *Lynumn* court held: "It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.' . . . [¶] We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced." (*Id.* at p. 534.)

In *Tingle*, a Federal Bureau of Investigation agent, questioning a bank robbery suspect, told the woman she would not or might not see her child for a while if she went to prison. The agent also warned the suspect she faced a lengthy sentence and had "'a lot at stake.'" (*Tingle*, *supra*, 658 F.2d at p. 1334.) The Ninth Circuit found the objective of the interrogation was "to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time." (*Id.* at p. 1336.) The court noted the deep, fundamental relationship between parent and child and found an officer's deliberate preying upon the maternal instinct an improper influence leading to coercion. (*Ibid.*)

The *Tingle* court concluded: "The warnings that a lengthy prison term could be imposed, [fn. omitted] that Tingle had a lot at stake, that her cooperation would be communicated to the prosecutor, [fn. omitted] that her failure to cooperate would be similarly communicated, [fn. omitted] and that she might not see

her two-year-old child for a while must be read together, as they were intended to be, and as they would reasonably be understood. Viewed in that light, [the agent's] statements were patently coercive." (*Tingle*, *supra*, 658 F.2d at p. 1336.)

The questioning in both *Lynumn* and *Tingle* sought to exploit the parents' fear of separation from their children to elicit confessions. In both cases, the interrogator initiated the subject of separation, linking it to cooperation. (*Lynumn*, *supra*, 372 U.S. at pp. 532-533; *Tingle*, *supra*, 658 F. 2d at p. 1334.) The threat of separation was a technique employed by the interrogators to unnerve and frighten the suspects.

Here, in contrast, defendant herself initiated the discussion about her son. Honea did not expand upon or exploit her fears. Instead, Honea told defendant her failure to tell the truth would lead her "closer and . . . closer to losing your son and losing a whole bunch of your life." Honea did not link any separation to a lengthy sentence or warn defendant a lack of cooperation would be communicated to prosecutors. Even after the comment, defendant continued to insist a third party, Jose, suffocated Aguirra. We do not find, in the context of the entire interview, Honea's brief comment about defendant's son amounted to coercion.

Nor do we find Honea's statements concerning the baby's placement if defendant went to prison rendered defendant's statements inadmissible. Again, defendant initiated the discussion, questioning the detective about her son's future if both she and his father, Gallegos, went to jail. In response,

Honea asked defendant a series of questions that a court might consider in placing the child. Honea did not suggest or imply the police had any authority over custody matters, nor did he link custody to defendant's cooperation. Honea made no promises about the child's placement.

We find the trial court properly admitted defendant's statements made during the interview.

II. INSTRUCTIONAL ERROR

Defendant contends the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter. According to defendant, substantial evidence revealed she acted in the heat of passion when she helped Gallegos kill Aguirra.

Background

Defendant requested the voluntary manslaughter instruction. The court denied the request, finding neither the method of the killing nor defendant's statements to police supported a heat of passion claim. As the court noted: "In this case the decedent died of asphyxiation with a bag blocking internally or partially blocking her airway. [A b]ag that was found in her mouth and throat area as well as the bag over her head. [¶] Based on evidence, we have the statement of Ms. Rodriquez this was done by Mr. Gallegos either because Ms. Aguirra refused to have sex with him or from his desire to eliminate one of the two women in his life for some reason, it does not appear that either of those amount to a sudden quarrel or heat of passion. [¶] And even if you look at the circumstances of the death, separate and

distinct from Ms. Rodriquez's statement, the manner in which the person died does not carry with it any persuasive inference of sudden quarrel or heat of passion. When you add Ms. Rodriquez's narrative to it, clearly the Court does not feel there's any evidence of sudden quarrel, heat of passion or any other facts or circumstances that would justify voluntary manslaughter."

Following the trial, defendant moved for a new trial, arguing the trial court erred in refusing to instruct on voluntary manslaughter. The trial court disagreed, stating: ". . . I think it's pretty clear that we look to the acts and conduct of the perpetrator on the one hand to fix the nature and degree of the crime being committed and then to the knowledge of the aider and abettor on the other hand, to see if that person did, with knowledge of what was going on, somehow participate whether it be by assisting or otherwise."

Discussion

A trial court must instruct on all lesser included offenses supported by the evidence presented at trial. Substantial evidence is evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Manslaughter is the unlawful killing of a human being without malice. (§ 192.) Voluntary manslaughter may occur in two limited circumstances: when the defendant acts in a sudden quarrel or heat of passion, or when the defendant kills in an unreasonable but good faith belief in

having to act in self-defense. (*People v. Barton* (1995) 12 Cal.4th 186, 199.)

In the context of voluntary manslaughter based on a killing done in the heat of passion, there must be provocation sufficient to arouse the passions of a reasonable person under the same circumstances. The fundamental inquiry is whether the defendant's reason was "so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*People v. Wickersham* (1982) 32 Cal.3d 307, 326.)

Adequate provocation must be affirmatively demonstrated; it cannot be left to speculation. In evaluating the sufficiency of evidence of provocation, we may consider whether the defendant chose to testify. (*People v. Williams* (1969) 71 Cal.2d 614, 624.)

Defendant argues sufficient evidence supported an instruction on voluntary manslaughter based on heat of passion. Defendant points to evidence that she and Gallegos had a child. Gallegos left her and began seeing Aguirra. Defendant, still in love with Gallegos, tried to disrupt his relationship with Aguirra. Defendant fought with and threatened Aguirra. The night of the murder, Gallegos attempted to have sexual intercourse with Aguirra while defendant sat in the van. Defendant began to cry because she could not believe Gallegos would attempt to have sex with Aguirra in front of defendant.

Defendant claims her obsession with Gallegos and jealousy of Aguirra support a voluntary manslaughter instruction based on heat of passion. Defendant's "heat of passion was exacerbated by being forced to watch while her former lover attempted to have sex with his current lover."

While the evidence defendant cites provides her with a motive for wanting Aguirra dead, we do not find it sufficient to show defendant acted in the heat of passion when she helped Gallegos kill Aguirra. As the prosecution points out, defendant's tape-recorded interview with Honea provides the only evidence of defendant's state of mind during Aguirra's murder.

During the interview, defendant described the events immediately preceding the murder:

"[Defendant]: And we stopped and I stayed in the front seat, and he went in the back with [Aguirra]. That's when he tried to get her to have sex with [him]. And I started crying because I felt bad 'cuz I couldn't believe he was doing that in front of me.

"[Honea]: OK.

"[Defendant]: He kept telling me to shut up. He said he wanted to get things out of the way that night. He wanted to get over everything because everybody kept telling him that [Aguirra] was cheating on him, and this Jose Cortez guy kept telling me that he was with her and he was going to get married with her or something like that.

"[Honea]: OK.

"[Defendant]: So . . . we stopped there, he tried to have sex with her . . . she didn't want to . . . she kept pushing . . . tried to push him out of the way but then she couldn't.

"[Honea]: OK.

"[Defendant]: That's when I kept telling him, 'Don't do that . . . .' And he said, 'You know what . . . what you need to do is get me a bag.' And I go, 'What for?[']

"[Honea]: . . . Go ahead.

"[Defendant]: And he just said, 'Just get me the bag.' So I went to the back because I had lots of bags from the 98¢ Store that me and my friend had just gone to buy. So I just . . . .

"[Honea]: In Chico?

"[Defendant]: Yeah, so I just got one of the bags that had stuff in it . . . I put it in another one, and I gave it to him. [¶] . . . [¶] So, I gave him the bag. He told me to sit back where I was at, so I sat back. [Aguirra] didn't even think nothing."

Nothing in defendant's statement supports her assertion that she was forced to watch Gallegos and Aguirra have sex in the van. Nor does her statement reveal any evidence of passionate or irrational behavior on defendant's part. Defendant simply followed Gallegos's instructions, finding a bag and holding Aguirra's arms while Gallegos suffocated her. Defendant's controlled actions belie any "heat of passion" on

her part during the murder. We find insufficient evidence to support an instruction on voluntary manslaughter.[4]

III. REQUEST FOR A CONTINUANCE

Defendant argues the trial court violated her right to counsel by denying her request for a 30-day continuance shortly before trial. Defendant requested the continuance to allow retained counsel to substitute in for appointed counsel. According to defendant, since the request was reasonable and would not cause serious inconvenience, the court abused its discretion in denying the request.

Background

Less than two days prior to the start of trial, the court held a hearing to consider defendant's request to allow retained counsel to substitute for appointed counsel. Retained counsel Grady Davis moved to substitute for appointed counsel Eric Ortner on the condition the trial be continued. Six weeks earlier, Davis had met with defendant's family. Davis initially planned to serve as "second chair" during the trial. However, according to Davis, the arrangement was no longer feasible. Davis stated: "Even in light of that, I would be willing to substitute in as attorney of record . . . ." He estimated he would need an additional 30 days to prepare for trial.

---

[4] The People concede the trial court erred in concluding that defendant's liability as an aider and abettor was necessarily the same as that of the perpetrator. (*See People v. McCoy* (2001) 25 Cal.4th 1111, 1118-1120.) However, we affirm the trial court's findings if correct under any theory. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

The prosecutor objected, noting trial had previously been twice continued for a total of seven months. The current trial date had been chosen to accommodate the schedules of over 20 witnesses. The prosecution stated the prosecution's witnesses had been lined up for trial.

Ortner stated he first learned of defendant's decision to replace him two days previously. A conversation with defendant and her family "caused things to come to a head." Ortner was prepared to try the case as scheduled.

The trial court noted it scheduled the trial date in response to defendant's motion to allow the defense more time to investigate prior to trial. The court found the latest request for a continuance too close to the current trial date and denied the request and denied the motion. The court explained: "The primary issue is the closeness to November 13. Today is the 8th, tomorrow is Friday, then there's three non court days so really we're in court days -- we're about 48 hours away from jury selection plus or minus. [¶] The cases that I reviewed indicate that . . . Ms. Rodriquez does have a right to counsel of her choice and to substitute counsel so long as it does not affect the proceedings of the court or impact them unduly. The Court feels that to start all over again with the trial court would have that effect particularly in light of the latitude that the Court has given in setting this date five months ago and over the People's objection. [¶] So the Court will deny the request for continuance. That doesn't mean Mr. Davis can't

substitute in, I'm not denying him from substituting in but I am denying the continuance."

Discussion

"Continuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation is in and of itself good cause." (§ 1050, subd. (e).) What constitutes good cause is a factual question to be determined by the trial court. (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 40.) The lateness of a continuance request may be a significant factor justifying a denial absent compelling circumstances to the contrary. (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850 (*Jeffers*).)

Generally, a trial court has discretion whether to grant a continuance to permit a defendant to be represented by retained counsel. If the court denies the request, the burden is on the defendant to establish an abuse of discretion. (*Jeffers*, *supra*, 188 Cal.App.3d at p. 850.) The court may deny a continuance if the defendant is "unjustifiably dilatory" in obtaining counsel or if the defendant arbitrarily chooses to substitute counsel at the time of trial. (*People v. Courts* (1985) 37 Cal.3d 784, 790-791 (*Courts*); *Jeffers*, *supra*, 188 Cal. App. 3d at p. 850.)

In deciding whether the denial of a continuance was arbitrary, we look to the circumstances of each case, paying particular attention to the reasons presented to the trial court at the time the request was denied. (*Courts*, *supra*, 37 Cal.3d at p. 791.) When the continuance is requested on the eve of trial, the timing of the request may be a significant factor

justifying denial "absent compelling circumstances to the contrary." (*Jeffers*, *supra*, 188 Cal.App.3d at p. 850.)

Here, the trial court did not, as defendant suggests, deny a request for substitution of counsel. The court denied defendant's request for a continuance and allowed retained counsel to substitute in before trial. In effect, the court allowed the substitution but required retained counsel to adhere to the trial schedule.

We find no abuse of discretion on the part of the trial court in denying the request for a continuance. Defendant's family approached Davis about representing defendant approximately six weeks before trial. However, neither Davis nor Ortner informed the court regarding Davis's substitution as counsel until two days before the start of trial. In addition, the court had already continued the previous trial date by seven months at defendant's request. Trial had ultimately been set after over 20 prospective witnesses had been polled as to their availability. The tardy request, in conjunction with the mechanics of setting a trial date to accommodate counsel, witnesses, and the court's own calendar, and defendant's failure to explain why Ortner could not adequately represent her support the trial court's denial of defendant's request for a continuance.

IV. POLYGRAPH EVIDENCE

Defendant contends the trial court violated her federal constitutional right to present a defense by refusing to allow her to introduce evidence that she passed a privately

administered polygraph test. Although defendant concedes polygraph evidence is inadmissible under Evidence Code section 351.1, defendant argues the trial court failed to apply the criteria developed by the United States Supreme Court for admission of scientific evidence.[5]

Background

Prior to trial, defense counsel moved to introduce evidence that she passed a polygraph test administered by Sam Lister, a retired law enforcement officer. Defense counsel stated Lister could establish his qualifications as an expert in polygraph examinations. In addition, defense counsel stated his belief that polygraph evidence is gaining acceptance within the scientific community.

The trial court asked the prosecution if it would be willing to stipulate to the admission of polygraph evidence. The prosecution declined. The court found the evidence inadmissible under Evidence Code section 351.1, finding: "I will operate on the premise that Mr. Lister, if called and asked his credentials, could establish himself as a qualified operator of a polygraph device and that he would meet any foundational requirements to give an opinion, just as we would require of a

---

[5] Evidence Code section 351.1, subdivision (a) provides: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results."

doctor or a chemist or anyone else. But that doesn't make the subject matter of the opinion admissible. I don't see how under 351.1 I could allow this . . . . Basically, you're absolutely right, this is a Kelly-Frye situation but the legislature has, based on its own analysis, conducted the Kelly-Frye analysis for all of the courts of the State of California. [¶] If this legislation were not here, I would hear from Mr. Lister as to his qualifications and then I would hear as to, from him or others as to the other aspects of the so called Kelly-Frye test regarding acceptance of the technique and the scientific community and anything else that would bear upon its reliability. [¶] But where the legislature . . . has, by enacting 351.1 of the Evidence Code, told all trial judges that such evidence is either unreliable or irrelevant or combinations there of [*sic*], I think I have no choice but to exclude any reference by either side to polygraph and, obviously, if the shoe were on the other foot, if Ms. Rodriquez had flunked a polygraph and [the prosecutor] wanted that result in, I would have to make the same ruling if he wanted me to ignore 351.1."

Discussion

Defendant contends the trial court's "mechanistic" application of the state evidentiary rule excluding unstipulated polygraph evidence violated her constitutional right to present a defense. We disagree.

It is true, as defendant notes, that "'[a] State's interest in barring unreliable evidence does not extend to per se exclusions [of evidence] that may be reliable in an individual

case.'" However, states remain free to make judgments regarding the integrity of certain types of evidence and to impose categorical restrictions on admissibility. The Sixth Amendment does not compel all evidentiary judgments to be ad hoc. The polygraph cases cited by defendant do not involve a constitutional challenge to the exclusion of polygraph evidence but concern its admissibility under the Federal Rules of Evidence. Some federal courts have concluded, based on *Daubert v. Merrell Dow* (1993) 509 U.S. 579 [125 L.Ed.2d 469] (*Daubert*), that a rule of per se inadmissibility is inappropriate under the Federal Rules of Evidence. We, of course, are bound by the California Evidence Code rather than federal evidence rules. *Daubert* does not displace *People v. Kelly* (1976) 17 Cal.3d 24, which construed the California Evidence Code in adopting its standard for admissibility. More to the point, *Daubert* does not preclude application of Evidence Code section 351.1.

The constitutional principle on which defendant relies -- that a defendant has the right to offer evidence material and favorable to her defense -- has never been applied to compel the admission of exculpatory polygraph evidence. While defendant complains about the "mechanistic" application of Evidence Code section 351.1, the United States Supreme Court approved a similar "mechanistic" application of a provision excluding polygraph evidence in military courts martial. (*United States v. Scheffer* (1998) 523 U.S. 303 [140 L.Ed.2d 413] (*Scheffer*).) In so doing, the court rejected the precise

constitutional challenge asserted by defendant. The court acknowledged the Sixth Amendment right to present a defense but held it was not unlimited and must be balanced against "'"other legitimate interests in the criminal trial process."'" (*Id.* at p. 308.) Thus, the need to ensure that only reliable evidence is admitted at trial; the preservation of the jury's role in determining witness credibility; and the avoidance of collateral litigation concerning the polygraph, which could distract the jury from the more important issues of the trial, all supported a rule of per se inadmissibility. The court distinguished *Rock v. Arkansas* (1987) 483 U.S. 44 [97 L.Ed.2d 37] and *Chambers v. Mississippi* (1973) 410 U.S. 284 [35 L.Ed.2d 297], cases cited by defendant, as involving rules that "significantly undermined fundamental elements of the defendant's defense." (*Scheffer*, *supra*, 523 U.S. at p. 315.) In contrast, polygraph evidence served only to bolster defendant's credibility; defendant was not deprived of a defense in contravention of the Sixth Amendment.

In light of *Scheffer*, and in the absence of any other controlling authority, we reject defendant's constitutional challenge to the trial court's ruling. There was no error.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

DAVIS, Acting P.J.

NICHOLSON, J.